FIRST CONSOLIDATED SDN. BHD.

v.

PADU EHSAN SDN. BHD. & ANOR. AND ANOTHER SUIT

HIGH COURT MALAYA, MELAKA
TUAN HAIDAR BIN MOHD NOOR J.
[CIVIL SUIT NOS. 22-113 OF 1992 & 22-114 OF 1992]
28 MAY 1994

PRACTICE & PROCEDURE: Appeal against order of Deputy Registrar dismissing garnishee's application to set aside two garnishee orders absolute - Judgment creditor raising preliminary objection that Deputy Registrar could not review garnishee orders absolute as they were final orders - Whether Deputy Registrar functus officio - Consideration of O. 32 r. 6, O. 49 & O. 92 RHC.

The garnishee filed an application to set aside two garnishee orders absolute granted by the Deputy Registrar. At the hearing of the application, the judgment creditor raised a preliminary objection on the ground that the Deputy Registrar could not review the two garnishee orders absolute that she made earlier as they were final orders and the Deputy Registrar was *functus officio*. The Deputy Registrar agreed and dismissed the garnishee's application with costs.

The garnishee appealed contending that the garnishee's application was not properly heard when the two orders absolute were made. In respect of the sum of RM60,220.22, the garnishee claimed that the figure was not the final figure due to the judgment debtor as it was subject to final measurement by its engineer and the Deputy Registrar made the order absolute without hearing the engineer. In respect of the sum of RM239,779.78, the order was made in the absence of Counsel for the garnishee. There was conflicting affidavit evidence as to the reason for the Counsel's absence.

The main issue was whether the Deputy Registrar could review the orders that she made.

Held:

[1] The hearing in the absence of the garnishee's Counsel and its witness was an *ex parte* hearing and the order made on such a hearing was an *ex parte* order even though the application was not an *ex parte* application. As such the Court had the jurisdiction under O. 32 r. 6 of the Rules of the High Court 1980 (RHC) to set it aside. In the circumstances the Deputy Registrar erred in ruling that she was *functus officio* and no longer had the jurisdiction to entertain the garnishee's application. Even assuming O. 32 r. 6 was not applicable in an O. 49 situation, the Court was entitled to invoke its inherent jurisdiction under O. 92 to prevent injustice.

[2] The appeal should be allowed and the order of the Deputy Registrar set aside. The Deputy Registrar is directed to proceed to hear the garnishee's application and make the appropriate orders as she deems fit after hearing the parties. The costs of the appeal should go to the judgment creditor in any event.

[Appeal allowed with costs].

Case referred to:

Loo Chay Meng v. Ong Cheng Hoe (Gamuda Sdn. Bhd. Garnishee) [1990] 1 MLJ 445 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 32 r. 6, O. 49, O. 92

For the garnishee - Amir Nordin (Devan with him); T/n. Nordin & Phua
For the judgment creditor - Yau Jiok Hua; T/n. Yau Jiok Hua & Co.

JUDGMENT

Haidar bin Mohd Noor J:
Majlis Perbandaran Melaka Bandaraya Bersejarah ('the garnishee') filed a summons in chambers ('SIC') dated 31 January 1994 (encl. 251) before the Deputy Registrar praying, *inter alia*, for an order to set aside the two garnishee orders absolute made by her in respect of RM60,220.22 and RM239,779.78 totalling RM300,000. It is supported by the affidavit of Sulaiman bin Atan, its legal director.

At the hearing of the SIC on 15 February 1994, Mr. Yau, Counsel for the judgment creditor raised a preliminary objection on the ground that the Deputy Registrar could not review the two garnishee orders absolute that she made earlier on as such orders are final orders. Mr. Yau contended that she was *functus officio*. The Deputy Registrar agreed and ruled that the SIC by itself therefore failed and dismissed it with costs. The garnishee filed an appeal (encl. 261) against the said order of the Deputy Registrar.

The appeal came before me for hearing twice and it was twice adjourned at the request of Counsel for the garnishee. I must say, with much regret, that the Counsel for the garnishee seemed to be a bit confused on the direction that he should take in this appeal. Be that as it may, it is now finally clear that the appeal is centred on the issue - whether the Deputy Registrar could review the orders that she made as she was *functus officio* as contended by Mr. Yau, Counsel for the judgment creditor.

The main complaint of the garnishee is that there was no proper recording of the evidence by the Deputy Registrar. In other words, the garnishee was not properly heard by her when she made the two orders absolute.

In respect of the order absolute for the sum of RM60,220.22, the garnishee claimed this sum is not a final figure due to the judgment debtor as it is subject to final measurement by its engineer. The engineer of the garnishee, it seemed was present in Court but could not see his Counsel as apparently the Counsel was in the chambers of the Deputy Registrar who made the order absolute in the sum of RM60,220.22 without hearing the engineer.

In respect of the order absolute for the sum of RM239,779.78, it seemed the order was made in the absence of the Counsel for the garnishee. It is not disputed that the order was made in the absence of the Counsel for the garnishee but Mr. Yau, Counsel for the judgment creditor, submitted that he was asked by the then Counsel for the garnishee, one Mr. Yap to mention on his behalf and to inform the Deputy Registrar that he had no objection in respect of the sum to be garnished in respect of Civil Suit No. 113/1992 and Civil Suit No. 114/1992 as the amount to be garnished was the same (see paragraph 7(a) of the affidavit of Mr. Yau @ encl. 308). However, Mr. Yap in his affidavit (encl. 305) explained that he thought since the Civil Suit No. 113/1992 and Civil Suit No. 114/1992 were consolidated and since the Deputy Registrar made an order absolute for the sum of RM60,220.22 then he believed that the whole matter was adjudicated upon by her and hence his presence was no longer necessary. According to Mr. Yap, he did converse with Mr. Yau to the effect that only a sum of RM60,220.22 was due to the judgment debtor and thereafter left the Court premises. He denied having asked Mr. Yau to mention on

his behalf (see paragraph 6 of encl. 305). In view of the conflicting affidavit evidence, it would in the circumstances, be difficult for me to assess as to whose version is to be accepted. A look at the notes of the proceedings before the Deputy Registrar was also of not much help as she did not expressly record that Mr. Yau was mentioning on behalf of Mr. Yap, the then Counsel for the garnishee as claimed by Mr. Yau. An examination of the notes of the proceedings would seem to show that the proceedings were shabbily recorded by the Deputy Registrar. In the result, I am inclined to give the benefit of the doubt to the garnishee in that Mr. Yap was not present more arising out of the confusion due to the fact that the two civil suits were consolidated and that there was only one sum to be garnished. Further, the garnishee was not given the opportunity to give evidence as to the actual sum due to the judgment debtor. The garnishee now claims that after the measurement had been done, the actual sum due to the judgment debtor is RM27,065 only.

By virtue of the view that I take on the facts as disclosed in the affidavits and the notes of the proceedings, it seems clear to me that the hearing in the absence of the garnishee's Counsel and its witness is an *ex parte* hearing and the order made on such a hearing was an *ex parte* order even though the application so heard is not an *ex parte* application. As I am of the view that it was an *ex parte* order the Court has jurisdiction by O. 32 r. 6 of the Rules of the High Court 1980 to set it aside (see *Loo Chay Meng v. Ong Cheng Hoe (Gamuda Sdn. Bhd.. Garnishee)* [1990] 1 MLJ 445). In the circumstances, I am of the view that the Deputy Registrar erred in ruling that she was *functus officio* and no longer has jurisdiction to entertain the SIC (encl. 251).

Further, even assuming O. 32 r. 6 is not applicable in an O. 49 situation, the Court is entitled to invoke its inherent jurisdiction powers under O. 92 to prevent injustice and to that extent I agree with the views expressed by V.C. George, J. in *Loo Chay Meng's* case at pages 446/447:

> If O. 32 r. 6 cannot be applied in an O. 49 situation, then we have a situation of 'a lacuna in the face of the rules which causes a procedural injustice' in that it cannot be said that the 'rules contain provision making available sufficient remedies'. In my judgment, in that kind of situation and if there is injustice, the Court is not only entitled to but is obliged to make any order as may be necessary to prevent the injustice.
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> In the instant case, O. 32 r. 6 gives the Court the jurisdiction to set aside the *ex parte* order absolute. Alternatively, if O. 32 r. 6 is not applicable in an O. 49 situation, then the Court has the jurisdiction to set aside the order invoking its inherent jurisdiction. I will now hear arguments on the merits.

In the circumstances I am of the view that the appeal should be allowed and the order of the Deputy Registrar dismissing the SIC based on the preliminary objection of the judgment creditor be set aside. I direct that the Deputy Registrar proceed to hear the SIC and make the appropriate order or orders as she deems fit after hearing the parties. As for costs, the appeal was protracted due to the conduct of the Counsel for the garnishee in prosecuting this appeal and I direct that costs of the appeal should go to the judgment creditor in any event.